

DJZ

267 NLRB No. 176

D--1119
Livonia, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FATHER & SON PAINTING AND
REMODELING, INC.

and

Case 7--CA--21151

PAINTERS' DISTRICT COUNCIL
NO. 22 OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND
ALLIED TRADES OF THE UNITED
STATES AND CANADA, AFL--CIO

DECISION AND ORDER

Upon a charge filed on 10 September 1982 ¹ by Painters' District Council No. 22 of the International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL--CIO, herein called the Union, and duly served on Father & Son Painting and Remodeling, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on 29 October against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the National Labor Relations Act, as amended.

¹ All dates hereinafter are in 1982, unless otherwise indicated.

Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that since 19 June 1981 the Union has had a collective-bargaining agreement with Respondent, which has been in effect at all material times herein, covering certain of Respondent's employees in an appropriate unit.² Under that agreement Respondent, according to the complaint allegations, is required to make "monthly contributions to the Painters Union Deposit Fund for the insurance fund, vacation fund, pension fund and apprentice and journeymen training fund, together with fringe benefit forms indicating the amount of the fringe benefit contributions owing to said funds." That agreement also provides that "accountants of the fringe benefit trust funds can perform regular audits of the Respondent's payroll records to determine whether or not there has been compliance with the Agreement."

² The appropriate unit consists of:

All full-time and regular part-time apprentice and journeymen painters employed by the Respondent out of its facility at 33473 Curtis, Livonia, Michigan, but excluding all other employees, guards and supervisors as defined in the Act.

The complaint further alleges that Respondent breached that agreement by failing to submit timely fringe benefit reports or fringe benefit contributions to the Painters Union Deposit Fund for the months of February and March and by not responding to the Union's requests to audit Respondent's payroll records as required under the terms thereof. Respondent has failed to file an answer to the complaint and, therefore, these allegations stand uncontroverted.

On 9 May 1983 the General Counsel filed with the Board a "Motion To Transfer Case to the Board and for Default Judgment" on the ground that Respondent had failed to file an answer to the complaint as required under Section 102.20 of the Board's Rules and Regulations, Series 8, as amended. The Board thereafter on 11 May 1983 issued an order transferring the proceeding to the Board and giving Respondent Notice To Show Cause why the General Counsel's motion should not be granted. Respondent did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing issued by the General Counsel and duly served on Respondent specifically states that, unless an answer to the complaint is filed by Respondent within 10 days of service thereof, "all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board." Furthermore, the documentary evidence submitted by the General Counsel in support of its motion indicates that on 24 November the Regional Director sent Respondent a letter reminding it that an answer to the complaint had not yet been received and advising it that unless an answer was received by 6 December he would move for default judgment. No answer was received either by 6 December or by 9 May 1983, the date on which the General Counsel's Motion for Default Judgment was filed. No good cause for failure to file an answer having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted to be true. Accordingly, we find to be true all the allegations of the complaint and hereby grant the General Counsel's Motion for Default Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Michigan corporation with principal offices and places of business located at 33473 Curtis and 19030 Hillcrest in Livonia, Michigan, is engaged in providing residential and commercial painting and construction services. During the past year, a representative period, Respondent purchased and caused to be shipped to its places of business construction materials valued in excess of \$50,000 from points and places located outside the State of Michigan.

On the basis of the foregoing, we find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Painters' District Council No. 22 of the International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Since 19 June 1981, and at all relevant times herein, Respondent has maintained a collective-bargaining agreement with the Union requiring it to make monthly contributions to the Painters Union Deposit Fund for the insurance, vacation, pension,

and apprentice and journeymen funds, and to submit fringe benefit forms indicating the amount of fringe benefit contributions owing to said funds. Respondent is also required, under that agreement, to allow its payroll records to be audited by accountants of the fringe benefit trust funds to determine if Respondent is complying with the agreement. In February and March 1982, Respondent failed to submit fringe benefit contributions and fringe benefit reports as required under that agreement and since on or about 8 July and 2 August 1982 it has not responded to the Union's request to audit Respondent's payroll records as provided under the terms of that agreement.

By engaging in the above-described conduct, Respondent, we find, has refused to bargain collectively, and is refusing to bargain collectively, with the Union as the exclusive representative of Respondent's employees in an appropriate unit and has, therefore, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Father & Son Painting and Remodeling, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Painters' District Council No. 22 of the International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time apprentice and journeymen painters employed by Respondent out of its facility at 33473 Curtis, Livonia, Michigan, but excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 19 June 1981 the above-named labor organization has been and now is the recognized and exclusive representative of all employees in the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the aforesaid unit through its failure to make contributions, pursuant to a collective-bargaining agreement executed 19 June 1981 to the Painters Union Deposit Fund for the months of February and March 1982, its failure to submit fringe benefit reports, and its failure to respond to the Union's requests that it be allowed to audit Respondent's payroll records as provided

for in the aforesaid agreement, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In order to dissipate the effects of its unfair labor practices, Respondent shall be ordered to make the payments into the Painters Union Deposit Fund required by the collective-bargaining agreement which it has not made ³ and to reimburse employees for any expenses ensuing from Respondent's unlawful

³ Because the provisions of employees benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage (continued)

failure to make such required payments as set forth in Kraft Plumbing and Heating, Inc., 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All such payments to employees shall be made with interest as prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). Respondent shall also be required to submit the fringe benefit reports to the Union and to allow its payroll records to be audited by the Union, as required under the collective-bargaining agreement, to determine whether or not Respondent is complying with that agreement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Father & Son Painting and Remodeling, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union, Painters' District Council No. 22 of the International Brotherhood of Painters and Allied Trades of the United States

³ the question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. Merryweather Optical Company, 240 NLRB 1213 (1979).

and Canada, AFL--CIO, as the exclusive bargaining representative of its employees in an appropriate unit by failing and refusing to make payments to the Painters Union Deposit Fund as required under its collective-bargaining agreement with the Union, by failing to submit fringe benefit reports detailing the amount of fringe benefit contributions owing to the various funds covered by the Painters Union Deposit Fund, and by refusing to allow the Union to audit its payroll records, as required by the terms of its agreement, to determine whether Respondent is complying therewith. The appropriate unit is:

All full-time and regular part-time apprentice and journeymen painters employed by Respondent out of its facility at 33473 Curtis, Livonia, Michigan, but excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole the employees in the appropriate unit by transmitting the payments owed to the Painters Union Deposit Fund pursuant to the terms of its collective-bargaining agreement with the Union, and by reimbursing unit employees for any expenses ensuing from Respondent's unlawful failure to make such required payments, in the manner set forth in the section of this Decision entitled "'The Remedy.'"

(b) Forward to the Union fringe benefit reports indicating the amount of fringe benefit contributions owed to the various

funds covered by the Painters Union Deposit Fund and allow the Union to audit its payroll records, in accordance with the terms of its collective-bargaining agreement, to determine if Respondent is complying therewith.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility at 33473 Curtis, Livonia, Michigan, copies of the attached notice marked "'Appendix.'"⁴ Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. 26 August 1983

Donald L. Dotson, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with the Union, Painters' District Council No. 22 of the International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL--CIO, as the exclusive representative of our employees in an appropriate unit, by failing or refusing to make payments to the Painters Union Deposit Fund, as required under our collective-bargaining agreement with the Union, and by failing to submit fringe benefit reports to the Union indicating the amount of fringe benefit contributions owed to the funds covered by the Painters Union Deposit Fund, and WE WILL NOT refuse to allow the Union to audit our payroll records, as required under the terms of our agreement with the Union, to determine our compliance therewith. The appropriate unit is:

All full-time and regular part-time apprentice and journeymen painters employed by us out of our facility at 33473 Curtis, Livonia, Michigan, but excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make employees in the appropriate unit whole by transmitting the payments owed to the Painters Union Deposit Fund pursuant to the terms of our collective-bargaining agreement with the Union and by reimbursing unit employees for any expenses they may

have incurred as a result of our unlawful failure to make such required payments, with interest, and WE WILL forward to the Union fringe benefit reports as required under our agreement and will allow the Union to audit our payroll records to determine our compliance with that agreement.

FATHER & SON PAINTING AND
REMODELING, INC.

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313--226--3244.